Supreme Court, U. S.
FILED
FEB 11 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1135

CLAUDE Y. PAQUIN, et ux.,
Petitioners,

versus

FOUR SEASONS OF TENN., INC., et al.;
NORMAN H. CRONK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

No.

CLAUDE Y. PAQUIN, et ux.,
Petitioners,

versus

FOUR SEASONS OF TENN., INC., et al.;
NORMAN H. CRONK,
Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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OPINIONS IN THE COURTS BELOW

The opinion of the United States District Court for the Northern District of Georgia was not reported. The U.S. Court of Appeals' opinion (with dissent) was reported at 519 F.2d 1105 (5th Cir., Sept. 17, 1975), *reh. denied* (with dissent) at 522 F.2d 1270 (Nov. 7, 1975). All these opinions are appended.

GROUNDS FOR INVOKING THIS COURT'S JURISDICTION

Sought to be reviewed is the judgment of the U.S. Court of Appeals for the Fifth Circuit whose opinion was dated September 17, 1975 and whose mandate

issued November 17, 1975, following the November 7, 1975 denial of a petition for rehearing. This court's jurisdiction to review the judgment in question by writ of certiorari is based upon 28 U.S.C. § 1254(1) which provides that

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
> * * *

28 U.S.C. § 2101(c) provides that, for a civil action such as this one, the writ of certiorari shall be applied for within ninety days after the entry of the judgment sought to be reviewed.

QUESTIONS PRESENTED FOR REVIEW

(1) Where uncontroverted and uncontrovertible documentary evidence from public records shows facts as to which the trial court refused to make findings, is it proper and consistent with due process for a reviewing court of appeals to supply findings of facts clearly in conflict with this evidence?

(2) Where a suit is uncontrovertibly filed a few days before the running of a one-year statute of limitations, has the court of appeals given the case consideration consistent with due process where it recites that the case was filed one month after it actually was filed and applies a standard of proof statutorily required only after the one-year statute of limitations has run?

(3) Is the seeking of a bankruptcy court's protection for a land developer a material fact required to be disclosed under the Interstate Land Sales Full Disclosure Act in a property report given to prospective land purchasers?

(4) Is a commissioned salesman who procures land sales for a land developer liable as a "selling" agent under the Interstate Land Sales Full Disclosure Act?

(5) May the damages recoverable under the Interstate Land Sales Full Disclosure Act include interest on the purchase price of land which proved to be worthless?

STATUTES WHICH THE CASE INVOLVES

The Interstate Land Sales Full Disclosure Act, P.L. 90-448, 82 Stat. 590-99, is involved in this case. The pertinent sections involved are:

Sec. 1402. For the purposes of this title, the term —

> * * * *
>
> (4) "developer" means any person who, directly or indirectly, sells or leases, or offers to sell or lease, or advertises for sale or lease any lots in a subdivision;
>
> (5) "agent" means any person who represents, or acts for or on behalf of, a developer in selling or leasing, or offering to sell or lease, any lot or lots in a subdivision;

but shall not include an attorney at law whose representation of another person consists solely of rendering legal services;

* * * *

(9) "purchaser" means an actual or prospective purchaser or lessee of any lot in a subdivision;

(10) "offer" includes any inducement, solicitation, or attempt to encourage a person to acquire a lot in a subdivision.

Sec. 1404. (a) It shall be unlawful for any developer or agent, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails —

(1) to sell or lease any lot in any subdivision unless a statement of record with respect to such lot is in effect in accordance with section 1407 and a printed property report, meeting the requirements of section 1408, is furnished to the purchaser in advance of the signing of any contract or agreement for sale or lease by the purchaser; and

(2) in selling or leasing, or offering to sell or lease, any lot in a subdivision —

(A) to employ any device, scheme, or artifice to defraud, or

(B) to obtain money or property by means of a material misrepresentation with respect to any information included in the statement of record or the property report or with respect to any other information pertinent to the lot or the subdivision and upon which the purchaser relies, or

(C) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a purchaser.

* * * *

Sec. 1406. The statement of record shall contain the information and be accompanied by the documents specified hereinafter in this section —

(1) the name and address of each person having an interest in the lots in the subdivision to be covered by the statement of record and the extent of such interest;

(2) a legal description of, and a statement of the total area included in, the subdivision and a statement of the topography thereof, together with a map showing the division proposed and the dimensions of the lots to be covered by the statement of record and their relation to existing streets and roads;

(3) a statement of the condition of the title to the land comprising the subdivision, including all encumbrances and deed restrictions and covenants applicable thereto;

(4) a statement of the general terms and conditions, including the range of selling prices or rents at which it is proposed to dispose of the lots in the subdivision;

(5) a statement of the present condition of access to the subdivision, the availability of sewage disposal facilities and other public utilities (including water, electricity, gas, and telephone facilities) in the subdivision, the proximity in miles of the subdivision to nearby municipalities, and the nature of any improvements to be installed by the developer

and his estimated schedule for completion;

(6) in the case of any subdivision or portion thereof against which there exists a blanket encumbrance, a statement of the consequences for an individual purchaser of a failure, by the person or persons bound, to fulfill obligations under the instrument or instruments creating such encumbrance and the steps, if any, taken to protect the purchaser in such eventuality;

* * * *

(12) such other information and such other documents and certifications as the Secretary may require as being reasonably necessary or appropriate for the protection of purchasers.

Sec. 1407.

* * * *

(c) If, at any time subsequent to the effective date of a statement of record, a change shall occur affecting any material fact required to be contained in the statement, the developer shall promptly file an amendment thereto. Upon receipt of any such amendment, the Secretary may, if he determines such action to be necessary or appropriate in the public interest or for the protection of purchasers, suspend the statement of record until the amendment becomes effective.

* * * *

Sec. 1408. (a) A property report relating to the lots in a subdivision shall contain such of the information contained in the statement of record, and any amendments thereto, as the Secretary may deem necessary, but need not include the documents

referred to in paragraphs (7) to (11), inclusive, of section 1406. A property report shall also contain such other information as the Secretary may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of purchasers.

* * * *

Sec. 1410. (a) Where any part of the statement of record, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein, any person acquiring a lot in the subdivision covered by such statement of record from the developer or his agent during such period the statement remained uncorrected (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue the developer.

(b) Any developer or agent, who sells or leases a lot in a subdivision —

(1) in violation of section 1404, or

(2) by means of a property report which contained an untrue statement of a material act or omitted to state a material fact required to be stated therein, may be sued by the purchaser of such lot.

(c) The suit authorized under subsection (a) or (b) may be to recover such damages as shall represent the difference between the amount paid for the lot and the reasonable cost of any improvements thereto, and the lesser of (1) the value thereof as of the time such suit was brought, or (2) the price at which such lot shall have been disposed of in a bona fide market trans-

action before suit, or (3) the price at which such lot shall have been disposed of after suit in a bona fide market transaction but before judgment.

(d) Every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment.

(e) In no case shall the amount recoverable under this section exceed the sum of the purchase price of the lot, the reasonable cost of improvements, and reasonable court costs.

Sec. 1412. No action shall be maintained to enforce any liability created under section 1410(a) or (b)(2) unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 1401(b)(1), unless brought within two years after the violation upon which it is based. In no event shall any such action be brought by a purchaser more than three years after the sale or lease to such purchaser.

Sec. 1414. The rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity.

Sec. 1418. Any person who willfully violates any of the provisions of this title or the rules and regulations prescribed pursuant thereto, or any person who willfully, in a statement of record filed under, or in a property report issued pursuant to, this title, makes

any untrue statement of a material fact or omits to state any material fact required to be stated therein, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both.

CONCISE STATEMENT OF THE CASE

The petitioners were enticed to buy a lot by the respondent. The lot was part of a development covered by the Interstate Land Sales Full Disclosure Act. At the time of the sale, the developer was seeking, through its parent corporation, the protection of the bankruptcy court, but the property report given the petitioners (purchasers) at the time the respondent made the sale failed to disclose anything at all about the bankruptcy petition filed seven weeks earlier. The developer went bankrupt not too long thereafter, leaving the development without the amenities described in its property report, thus causing the petitioners' land to become unsellable and worthless. The Act provides for strict liability of both developer and selling agent, limited to the decrease in value of the lot, when a property report is defective and suit is brought within one year, and petitioners accordingly brought this suit.

The trial court found (without a jury) that the respondent was a selling agent, but it refused to acknowledge the evidence of bankruptcy. The court of appeals acknowledged the evidence of bankruptcy, but, misconstruing the corporate relationship between the developer of record, its parent, and the developer's own land-title-owning subsidiary, a majority held that the bankruptcy of one could not affect

the separate legal personality of another, and it alternatively held that Congress could not have meant to extend liability to mere commissioned salesmen. Circuit Judge Clark dissented on both counts. On petition for rehearing, Judge Clark acknowledged that the entire panel had misconstrued the corporate relationships, that indeed the developer of record itself had been named as seeking the bankruptcy court's protection, and he further indicated that not only did he dissent from the decision not to grant rehearing, but that his original dissent would have been even stronger had he not also fallen into the error originally committed by the whole panel.

BASIS FOR FEDERAL JURISDICTION

Under § 1420 of the Interstate Land Sales Full Disclosure Act.

> [the] district courts of the United States * * * shall have jurisdiction * * * of all suits in equity and actions at law brought to enforce any liability or duty created by this [Act]. Any such suit or action may be brought to enforce any liability or duty created by this [Act]. * * * Judgments and decrees so rendered shall be subject to review as provided in sections 1254 and 1291 of title 28, United States Code.* * *

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The court's review of this case is sought for three principal important reasons of the type outlined in this court's Rule 19(1)(b):

I — The court of appeals has by far departed from the accepted and usual course of judicial proceedings and from normal due process requirements.

The court of appeals' opinion reveals that the court's entire panel failed to apprehend the facts correctly. One circuit judge courageously acknowledged, in his dissent to the denial of rehearing, *see Paquin v. Four Seasons of Tenn., Inc.*, 522 F.2d 1270 (1975), his own as well as his brothers' error in the original consideration of the case. The most crucial facts involved come from uncontroverted and uncontrovertible documentary evidence (verified bankruptcy petition filed in the U.S. District Court of another circuit). For reasons unknown, the trial court had refused to make the findings called for by this evidence (namely that the developer and its parent were already in bankruptcy at the very time a land sale was made by means of a property report not disclosing the bankruptcy proceeding), and the court of appeals, on review, elected to make findings of its own which turned out to be clearly erroneous. But only one of the three judges was, later on, willing to concede the error made by *all* of the court's panel upon the original consideration of the case.

To illustrate how grievously the court of appeals' panel majority fell into error, this court's attention is drawn to the fact that the complaint was filed on July 6, 1971, which is within the one-year statute of limitations provided at section 1412 of the Interstate Land Sales Full Disclosure Act, 82 Stat. 596, 15 U.S.C. § 1711, since the improper sale complained of took

place 359 days earlier: yet, the court panel majority recited that the suit was filed on August 6, 1971, or a full month after suit was actually filed. It so happens that this would bring the suit outside the one-year statute of limitations and thus increase a plaintiff's burden of proof. Nothing justifies such "surgery" on the facts.

The court of appeals panel majority also engaged in repeated misspellings of the petitioners' name: this may be merely *damnum absque injuria*, but in cumulation with other errors in the panel majority's opinion it reflects a standard of care in the consideration of the case which strays far from the accepted and usual course of judicial proceedings and from the "due process" to which all litigants should be entitled, and perhaps more so in a federal court.

II — The court of appeals has decided a federal question in a way which conflicts with applicable decisions of this court.

In *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 153-54 (1972), this court essentially held that all that is necessary in a case involving primarily a failure to disclose (as is this case) is, not positive proof of reliance, but "that the facts be material in the sense that *a reasonable investor might have considered them important* in the making of [his] decision."

In this case, the court of appeals panel majority held that the land developer's entanglements in bankrupt-

cy proceedings were not material. While part of that decision may have resulted from misapprehension of the facts, part is due to misapplication of this court's *Affiliated Ute Citizens* holding. The petitioners believe that, in that case, this court promulgated "could a reasonable investor consider this information important in the making of his decision?" as the test of whether the information ought to be disclosed: in contrast, the court of appeals majority applied the standard of "is a subsidiary corporation affected, as a separate legal entity, by its parent corporation's bankruptcy proceedings?," which is a different test. and the wrong one too. (The dissent to the denial of rehearing shows how, as a matter of fact, the subsidiary corporation was indeed entangled itself, by name, in the bankruptcy proceedings.) The test enunciated and applied by the panel majority of the court of appeals is wrong because it is based on a mere legalism, namely that corporations have separate legal personalities: when corporations enjoy a father-son relationship as with a 100% subsidiary, what reasonable investors care about is reality and the practical context, not the formalism of corporate law. By emphasizing the formalism of corporate law, the court of appeals majority has, in effect, decided a federal question in a way which conflicts with the many decisions of this court, emphasizing substance over form, which culminated in *Affiliated Ute Citizens*.

III — The court of appeals has decided an important question of federal law which has not been, but should be, settled by this court.

The question that needs to be settled by this court is whether a commissioned land salesman for a land developer subject to the Interstate Land Sales Full Disclosure Act who uses a property report which fails to disclose all the facts in procuring the sale is himself liable to the buyer.

The practical context in which the situation always seems to present itself is that of the corporate developer in very shaky financial condition who does not disclose its financial condition and, in effect, insulates itself, *ipso facto*, from the civil liabilities that the Interstate Land Sales Full Disclosure Act provides for this failure to disclose, by going bankrupt. The Act also gives specific recourse against the "agent who sold" the land, and appears to limit the liability to the developer and the selling agent, *see* Act, § 1410(b) (but *see also* footnote 1, below). If the developer can go broke with impunity, and financial recourse cannot be had from the salesman (as the court majority here held), what is to prevent the salesman from outright

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1 A very recent decision of the Tenth Circuit, McGown v. Heidler, ___ F.2d ___ (10th Cir., Dec. 22, 1975, Docket Nos. 74-1755 and 74-1756), has held that not only can developers and selling agents be liable under the Act, but also directors and officers who participated in the fraud perpetrated upon the land purchasers. The reasons assigned for this holding by the court were that developers usually end up bankrupt, and thus judgment-proof, and selling agents are "often long gone or cannot respond pecuniarily," leaving purchasers holding the bag and remediless unless the Act is construed "flexibly to effectuate its remedial purposes." This holding appears very much in conflict with that of the Fifth Circuit in the present case, and this conflict between the circuits would give this court but one more reason to review the present case. Sup.Ct. Rule 19(1)(b). It would be strange if, in the Fifth Circuit, selling agents, who are singled out as civilly liable under the Act, were deemed *not* liable, whereas in the Tenth Circuit persons not even named in the Act could be liable.

carelessness, and even fraud, in his selling activities, and what recourse is left to the hapless buyer?

The question being presented then is whether there is a giant "civil liability loophole" in the Act in the case of developer financial failure. The court of appeals panel majority created one, in effect, by holding that "Congress did not mean to scoop up every salesman and make them [sic] pay for the misdeeds of others," even if they receive sales commissions in the process (and may have a right of contribution from others under the Act). Any appellate decision which nullifies the protection intended by Congress for consumers is important, for, as this Court has said many times, this kind of legislation is to be construed "not technically and restrictively, but flexibly to effectuate its remedial purposes," *Securities & Exchange Commission v. Capital Gains Research Bureau*, 375 U.S. 180, 186 (1963). Most land investors' losses stem from developer financial failure. Thus both legally and practically the question of salesman liability is important and deserving of being considered by this court.

PRAYER

WHEREFORE, the petitioners pray that this court issue the writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

CLAUDE Y. PAQUIN
Pro Se and Attorney for
Co-Petitioner
1224 Canton St.
Roswell, Georgia 30075

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the above and foregoing Petition have this date been served upon opposing counsel of record by placing the same in the United States mail, postage prepaid and properly addressed.

February ____, 1976.

CLAUDE Y. PAQUIN

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CLAUDE Y. PAQUIN and JANET D. PAQUIN

versus CA NO. 15.350

FOUR SEASONS OF TENNESSEE, INC. and
NORMAN H. CRONK

ORDER

Filed: March 29, 1974

This suit is brought under the provisions of the Interstate Land Sales Full Disclosure Act, (hereinafter referred to as the "Act") 15 U.S.C. §§1701 *et seq*, requiring a land developer to make a full disclosure of pertinent facts in the sale or lease of undeveloped, subdivided land. A default judgment was entered in favor of the plaintiffs against the defendant, Four Seasons of Tennessee, Inc. Motions for summary judgment filed by the plaintiffs and the remaining defendant, Cronk, have been submitted and denied. The case came on for trial and at the conclusion thereof the parties were directed to submit written arguments, proposed findings of fact and conclusions of law. The parties have complied with that direction and the court makes the following findings.

After reading a newspaper advertisement in June, 1970 the plaintiffs drove to Four Seasons of Georgia (hereinafter referred to as "Four Seasons"), a second

home recreation development near Newnan, Coweta County, Georgia to inspect the property. Upon their arrival at the subdivision, they were directed to the reception area where the sales manager explained to a number of people the various improvements and amenities which would be available upon completion of the development. At the end of the talk, the group was invited to a guided tour of the property.

The defendant, Norman H. Cronk, a retired military officer and a cemetery lot salesman, traveled to Four Seasons in the Spring of 1970 to look at the property and was offered a job as a "lineman". He was hired presumably because of his experience in selling burial plots and thereafter spent most of his weekends at the development until the first of September, 1970. Under his arrangement with Four Seasons, Cronk's duties were to escort prospective buyers around the project noting points of interest, proposed improvements and those under construction, and lot locations. If a prospective purchaser displayed interest in a particular lot the linemen, who also distributed maps and booklets containing plans of vacation houses, quoted prices and were authorized to offer a discount of $200.00 or more per lot. If a sale was made, the accompanying "lineman" received a commission of nine percent of the purchase price.

After the "briefing" by the sales manager the Paquins expressed an interest in a tour of Four Seasons and were assigned to Cronk. The defendant accompanied the plaintiffs on a detailed tour, pointing out the activity under way, including the club house, stables, pool, golf course, and the sites of future con-

struction such as boat facilities, lakes, road improvements and water and sewage systems.

Paquin expressed an interest in Lot Number 565 on a "small fishing lake" and he and Cronk carefully walked its boundary lines. The quoted price of the lot was $8,050.00 plus a required $350.00 for the water connection and $350.00 for a sewage tap, less the usual $200.00 discount. Cronk advised Paquin that he might procure a further reduction in price by conferring with the sales manager. Furthermore, Paquin was told that if he should later desire a more expensive lot on the "big lake", he could "trade up". Cronk stated that lots developed in the future would have a high price but would go fast. The prospective purchaser was favorably impressed so Cronk called to the sales office by a citizens band radio in his automobile to determine if Lot 565 was available. After receiving an affirmative response, he ordered the lot held and the group returned to the reception area for further negotiations with the sales manager. After a conference between Cronk and the sales manager, the lot was offered to Paquin for $8,000.00.

The Paquins briefly discussed the proposal and indicated they were interested in purchasing the lot. Cronk then carried them to the closing facility where he gave them purchase materials including a Four Seasons of Georgia property report. Paquin carefully read the report. Although Cronk did not prepare the purchase papers and contract of sale, he was present during most of this time answering the plaintiffs' questions about the property report, financing and construction deadlines. Paquin tendered a post-dated check for the down payment with Cronk's approval.

Prior to the filing of this suit all activity at Four Seasons ceased. The last recorded sale of lots in the development was in early December of 1970. No further improvements have been made, the roads are impassable and only one residence at the subdivision is occupied. No sewage system is available nor will the Coweta County Health Department issue permits for installation of septic tanks because the soil composition does not permit adequate drainage and absorption. At the present time, one real estate broker appraises the value of the Paquin lot at $100.00.

As noted in the prior orders, four issues remain for determination: (1) whether Cronk was an agent of Four Seasons within the meaning of the Act; (2) whether the defendants directly or indirectly made use of any means or instruments of transportation or communication in interstate commerce in selling property to the plaintiffs; (3) whether the property report furnished to the plaintiffs omitted statements required by the Act or contained false information; and (4) whether the purchase is exempt from the Act.

The Interstate Land Sales Act was enacted by Congress in 1968 to protect consumers particularly interested in the purchase of second home or recreational home sites. The Act requires developers and promoters selling or leasing fifty or more unimproved lots to file a "statement of record" disclosing all material and legal information relating to the property with the Secretary of Housing and Urban Development. The intent and purpose of complete disclosure is to deter or prohibit misrepresentation of material facts relating to land sales by the use of the

mails or other channels of interstate commerce. A property report, part of the statement of record, must be submitted to the buyer prior to the purchase of the property. 2 U.S. Cong. & Admin. News, 1968 at 3066.

The defendant urges that the transaction in this case was exempted by 15 U.S.C. §1702(a)(10). This exemption applies when the purchaser personally views the real estate and receives a warranty deed free and clear of liens and encumberances.

§1702. Exemptions

(a) Unless the method of disposition is adopted for the purpose of evasion of this chapter, the provisions of this chapter shall not apply to —

. . . .

(10) the sale or lease of real estate which is free and clear of all liens, encumberances, and adverse claims if each and every purchaser or his or her spouse has made a personal on-the-lot inspection of the real estate which he purchased and if the developer executes a written affirmation to that effect to be made a matter of record in accordance with rules and regulations of the Secretary. As used in this subparagraph, the terms "liens", "encumbrances", and "adverse claims" do not refer to property reservations which land developers commonly convey or dedicate to local bodies or public utilities for the purpose of bringing public services to the land being developed, nor to taxes and assessments imposed by a

State, by any other public body having authority to assess and tax property, or by a property owners' association, which, under applicable State or local law, constitute liens on the property before they were due and payable, nor to beneficial property restrictions which would be enforceable by other lot owners or lessees in the subdivision, if (A) the developer, prior to the time the contract of sale or lease is entered into, has furnished each purchaser or lessee with a statement, the form and content of which has been approved by the Secretary, setting forth in descriptive and concise terms all such reservations, taxes, assessments, and restrictions which are applicable to the lot to be purchased or leased, and (B) receipt of such statement has been acknowledged in writing by the purchaser or lessee, and a copy of the acknowledged statement is filed with the Secretary in accordance with such rules and regulations as he may require.

15 U.S.C. §1702(a)(10).

The Paquins made a personal inspection of the lot they subsequently purchased. Furthermore, the property report states that there are blanket mortgages or liens on the subdivision but that the lienholders will release a section if certain conditions are met.

5. Is there a blanket mortgage or other lien on the subdivision or portion thereof in which the subject property is located? Yes or No? If yes,

list below and describe arrangements, if any, for protecting interests of the buyer, if the developer defaults in payment on the lien obligation. If there is such a blanket lien, describe arrangements for release to a buyer of individual lots when the full purchase price is paid.

Yes.

The property is subject to purchase money mortgages in favour of I. Walker Brooks, James A. Beavers, Sr., Willie Thompson et al., John Thompson and Barbara A. Thompson, Aaron Young, William E. Davis and Welborn B. Davis, Jr.

The purchase money mortgages contain clauses whereby the lien holders shall grant a partial release of each Section before it is platted and lots sold from that particular Section upon the payment of a sum certain. Therefore, an individual purchaser's title is fully protected in the event that the developer defaults in payment of the above liens. It is not necessary that the buyer pay the full purchase price before he receives title.

However, default by the developer could result in foreclosure of the unplatted Sections and prevent the sale of additional lots. To date, the developer has met all of its financial commitments.

Plaintiff's Exhibit No. 7, (Four Seasons of Georgia's Property Report at 3.) There is no evidence, however, that the "sum certain" was paid so that the applicable lien on the section of property in which the plaintiffs' lot is located was released and, therefore, the purchase is not exempted from the provisions of the Act.

As previously discussed in the order of December 15, 1972, the use of interstate commerce only relates to the existence of federal jurisdiction, and is not an element of a particular transaction. Without question, the mails and telecommunications were used to facilitate the entire Georgia operation of Four Seasons of Tennessee, Inc. and Diversified Land Developers, Inc. (See order of December 15, 1972). The developer's activities reveal a "close and substantial" relationship to interstate commerce. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). "Commerce is not a technical legal conception but a practical one, drawn from the course of business." *Galbreath v. Gulf Oil Corp.*, 413 F.2d 941, 947 (5th Cir. 1969) citing *Swift & Co. v. United States*, 196 U.S. 375, 398 (1905). To find otherwise here would be to ignore the plain meaning of the terms as applied to this case.

The Act also provides that either the developer or his agent may be liable for damages in certain instances. 15 U.S.C. §1709. An "agent" means any person who represents, or acts for or on behalf of a developer in *selling* or *leasing*, or *offering* to sell or lease, any lot or lots in a subdivision. . . ." (emphasis added). 15 U.S.C. §1701(5). "Offer includes any *inducement, solicitation, or attempt to encourage* a person to acquire a lot in a subdivision." (emphasis added). 15

U.S.C. §1701(10). Whether Cronk was an agent of the developer depends upon the terms of the Act, as it relates to the facts of the case, and not, as the defendant implies, on Georgia or "hornbook" law. He quite correctly observes, however, that in the usual sense, an agent is one who acts or may act contractually for his principle, or affect in other ways his legal relations. Mechem, *Outlines of Agency*, 4th ed. §12; Seavey, *Law of Agency* (1964) §3 at 3. On the other hand, Congress, is effectuating the Act, has seen fit to expand the usual meaning of the word "agent" to include one who offers to sell a certain type real estate. As noted above, the term "offer" infers the act of *inducing, soliciting or attempting to encourage* another to purchase a subdivision lot. It is obvious from the evidence that Cronk offered to sell lots at Four Seasons. To characterize his representations to prospective buyers as anything but inducements, solicitations or attempts to encourage acquisition of lots would be unreasonable. For purposes of the Act, Cronk was an agent.

In the instant case, civil liability is predicated upon 15 U.S.C. §1709(b):

> Any developer or agent, who sells or leases a lot in a subdivision —
>
> (1) in violation of section 1703 of this title or
>
> (2) by means of a property report which contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein, may be sued by the purchaser of such lot.

15 U.S.C. §1703 provides in pertinent part:

> (a) It shall be unlawful for any developer or agent, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails —
>
> (1) to sell or lease any lot in any subdivision unless a statement of record with respect to such lot is in effect in accordance with section 1706 of this title and a printed property report, meeting the requirements of section 1707 of this title, is furnished to the purchaser in advance of the signing of any contract or agreement for sale or lease by the purchaser; and
>
> (2) in selling or leasing, or offering to sell or lease, any lot in a subdivision —
>
> (A) to employ any device, scheme, or artifice to defraud, or
>
> (B) to obtain money or property by means of a material misrepresentation with respect to any information included in the statement of record or the property report or with respect to any other information pertinent to the lot or the subdivision and upon which the purchaser relies, or
>
> (C) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a purchaser.

There is no evidence to show that the defendant, Cronk, knowingly and willfully misrepresented material facts in the sale of the lot in Four Seasons to the plaintiffs. While the line between honest belief and a sales "pitch" and purposeful misrepresentation may be fine and often difficult to determine, the testimony obviates the necessity for such a decision. *cf. United States v. Steinhilber*, 484 F.2d 386, 390 (8th Cir. 1973).

Liability under 15 U.S.C. §1703(a)(1) is dependent on a statement of record in effect pursuant to "section 1706 of this title" and a "property report meeting the requirements of section 1707 of this title, being furnished to the purchaser in advance . . ." of the sale. The statement of record filed with the Secretary of the Department of Urban Development (Defendant's Exhibit No. 3), complies with 15 U.S.C. §1706 (24 C.F.R. §1710.105). Similarly, the property report (Plaintiffs' Exhibit No. 7) fulfills the requirements of 15 U.S.C. §1707 (24 C.F.R. §1710.110). No evidence was adduced at the trial to establish the contrary. Neither is there any showing of a material misrepresentation or omission of material facts in the property report. Accordingly, the plaintiffs have not sustained the burden of proof in establishing their right of recovery.

To the extent that any findings of fact set forth above are deemed to be conclusions of law or to the extent that any of the foregoing conclusions of law are deemed to be findings of fact, the same shall be deemed conclusions of law or findings of fact, as the case may be.

JUDGMENT

A full evidentiary hearing having been had in this matter and both oral and documentary evidence having been presented by the parties, and the court having considered the pleadings, briefs and proposed findings of fact, proposed conclusions of law and arguments of both parties, and the court being fully advised in the premises, and having made its findings of fact and conclusions of law directing that judgment be entered herein in favor of the defendant, it is hereby

CONSIDERED, ORDERED AND ADJUDGED THAT:

1. Judgment be entered in favor of the defendant, Norman H. Cronk, against the complaint of the plaintiffs, Claude Y. Paquin and Janet D. Paquin, and

2. Said action is hereby dismissed with costs to be paid by the plaintiffs in this matter.

So ordered this the 29 day of March, 1974.

/s/ ALBERT J. HENDERSON, JR.
Judge, United States Distric Court
for the Northern District of
Georgia

APPENDIX B

Claude Y. PAQUIN et al.,
Plaintiffs-Appellants,

v.

FOUR SEASONS OF TENNESSEE, INC., et al., Defendants,

Norman H. Cronk, Defendant-Appellee.
No. 74-2890

United States Court of Appeals,
Fifth Circuit.

Sept 17, 1975.

Appeal from the United States District Court for the Northern District of Georgia.

Before COLEMAN, MORGAN and CLARK, Circuit Judges.

COLEMAN, Circuit Judge.

This is a case in which five gallons of "free" gasoline unexpectedly cost 8,000 dollars. The couple who bought the lot at the end of the Sunday ride in the gasoline buggy sustained a painful loss. They sued to retrieve their money. The District Court denied recovery against an *employee* of the developer. Despite our keen disapproval of what happened to the appellants, we are convinced on both the facts and the

law that the result was legally correct. The judgment will accordingly be affirmed.

We narrate the calamitous events in chronological order.

I

Facts of the Case

(a) Four Seasons

In the Spring of 1970, Diversified Land Developers, Inc., a Tennessee Corporation, domiciled at 1314 Parkway Towers, Nashville, had a wholly owned subsidiary known as Four Seasons of Tennessee. Near Newnan, Georgia, Four Seasons of Tennessee had under construction a "second home" recreational development known as "Four Seasons of Georgia". As if the multiplicity of seasons was not enough, Diversified Land Developers was a wholly owned subsidiary of Whale, Inc., also a Tennessee Corporation, domiciled at 4101 Charlotte Avenue, Nashville.

Whale, Inc. owned, among other things, franchises for Minnie Pearl's Chicken Stores and Minnie Pearl's Roast Beef Stores. On May 20, 1970, in the United States District Court for the Middle District of Tennessee, Whale petitioned for Chapter X bankruptcy relief. Ultimately, on March 1, 1972, Whale was adjudged to be "hopelessly insolvent with no business to operate".

In the meantime, on July 24, 1970, the President of Diversified Land Developers, Inc. purchased for cash

all of the outstanding capital stock of Diversified from Whale's bankruptcy trustee. Diversified was returned to its status as a totally independent, privately owned company. As already stated Diversified owned Four Seasons of Tennessee and that corporation operated the Newnan project. Four Seasons of Georgia, however, was not formally incorporated until December 17, 1970. In any event, Whale was two corporations removed from the Newnan development. There is no evidence in the record that Whale ever had anything to do with planning, promoting, or financing the development or that anybody directly connected with the Newnan development ever held out any purported connection with Whale.

(b) Enter the Paquins (buyers) and Cronk (defendant)

The developers advertised in the Atlanta papers that they would give five gallons of gasoline free to anyone who would visit the Newnan project. On Sunday, July 12, 1970, Mr. and Mrs. Claude Paquin took advantage of this offer.

The development was in its early stages, but the master plan for the community called for many recreational amenities, such as a golf course, several lakes for boating and fishing, bridle paths, and a clubhouse for all residents of the development. Although it was a Sunday afternoon, there was much activity about the place and lots appeared to be selling rapidly.

First, the Paquins, along with others, heard a sales talk by George Day, Sales Manager for Four Seasons

of Tennessee. The Pacquins were then assigned for a tour of the development with Norman A. Cronk, a retired Lieutenant Colonel and part-time employee for Four Seasons, who was destined to become a defendant in the lawsuit. On the tour the Pacquins became interested in a lot located on a small fishing lake and entered into negotiations to purchase it. Cronk got in touch with the sales manager, who named the final price figure for the lot. Cronk then escorted them to the sales office. There the Pacquins were presented with a project property report, as required by 15 U.S.C. §§ 1703, 1707. Mr. Paquin carefully read the property report and a pamphlet detailing restrictive covenants applicable to the project.

At the Bench trial before Judge Henderson, Mr. Paquin testified as follows:

> "When he [Cronk] came back we asked him various questions about the property report. We brought up the fact there were statements in the property report that everything was dependent upon the developer obtaining adequate financing and this sort of thing, so I asked him, 'How are sales going? Are you selling lots the way that things are expected to be sold so you can meet your commitments?" And he said, 'Oh, yes. Sales are real good. And you can see from all the activity today,' or words to that effect."

The PROPERTY REPORT stated:

> "No assurances of completion can be given for any of the above services to be expressly provided

> by the developer at Four Seasons of Georgia other than the good faith and past reputation of the developer. Completion of these, as in other areas of development, will be dependent upon the satisfactory sale of lots at Four Seasons of Georgia and the developer's ability to secure adequate financing."

With reference to the completion of the proposed lodge, lake, golf course, recreational areas, dry-dock storage and marina, and riding academy, it was expressly stated as to each *individually* that

> "Completion is dependent upon the satisfactory sale of lots at Four Seasons of Georgia and the developer's ability to secure adequate financing."

Thus, at seven points in the property report the warning flag was hoisted: the fate of the project depended upon the satisfactory sale of lots and the ability of the developer to obtain adequate financing. Mr. Paquin noticed these express provisions, and questioned Mr. Cronk about it before he and his wife executed the sales contract.

The evidence shows that inability to seli the required number of lots was a prime cause of the project failure.

After Mr. Paquin had read the property report and the restrictive convenant pamphlet and had announced his decision to purchase the lot, he was presented a sales contract, which he and his wife signed before a secretary in the sales office. This sales con-

tract was dated at 5:40 p.m., Sunday, July 12, 1970. The seller in the contract was named as Four Seasons of Tennessee. Norman Cronk's name was typed in as the "authorized representative" and the evidence is clear that Cronk did not know his name was typed in on the sales contract. For his part in the sale of the property Cronk received a commission of 9% of the sale price.

By August 24, 1970, the Paquins had paid the purchase price in full. However, they did not demand delivery of a deed of conveyance contemporaneously with delivery of the final payment. It was not until November that the deed was recorded in the office of the Coweta County Clerk and delivered to Mr. Paquin. This delay, however, is of no material significance for it in no wise adversely affected title in the Paquins.

II

The Interstate Land Sales Full Disclosure Act of 1968, as amended

What happened to the Paquins was occurring with enough frequency by 1968 that the Congress of the United States became concerned.

On August 1, 1968, the President signed Senate Bill 3497 (Public Law 90 — 448, 82 Stat. 476). This was a comprehensive housing statute, containing seventeen titles and 136 printed pages. Title XIV — Interstate Land Sales, effective 270 days after the date of its enactment, is to be cited as the "Interstate Land Sales Full Disclosure Act" and is codified at 15 U.S.C. § 1701 et seq.

Congress amended the original Act in 1969 and again in 1974, Public Law 91 — 152 (1969) and Public Law 93 — 383 (1974).

The Act closely parallels the philosophy and approach of the Securities Act of 1933. The underlying purpose of both is that prior to the purchase the buyer must be informed of facts which would enable a reasonably prudent individual to make an informed decision about purchasing the security or the property. The test of materiality is whether a reasonable investor might have considered the omitted fact or erroneous statement as important in making a decision. *See Affiliated Ute Citizens of Utah v. United States*, 1972, 406 U.S. 128, 153-54, 92 S.Ct. 1456, 1472, 31 L.Ed.2d 741.

In this appeal we are particularly concerned with pertinent portions of two sections of the Act, §§ 1404 and 1410 [15 U.S.C. §§ 1703 and 1709]:

Prohibitions Relating To The Sale Or Lease Of Lots In Subdivision

Sec. 1404. (a) It shall be unlawful for any developer or agent, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails —

(1) to sell or lease any lot in any subdivision unless a statement of record with respect to such lot is in effect in accordance with section 1407 and a printed property report, meeting the re-

quirements of section 1408, is furnished to the purchaser in advance of the signing of any contract or agreement for sale or lease by the purchaser; and

(2) in selling or leasing, or offering to sell or lease, any lot in a subdivision —

(A) to employ any device, scheme, or artifice to defraud, or

(B) to obtain money or property by means of a material misrepresentation with respect to any information included in the statement of record or the property report or with respect to any other information pertinent to the lot or the subdivision and upon which the purchaser relies, or

(C) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a purchaser.

Civil Liabilities

Sec. 1410. (a) Where any part of the statement of record, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein, any person acquiring a lot in the subdivision covered by such statement of record from the developer or his agent during such period the statement remained uncorrected (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue the developer.

(b) Any developer or agent, who sells or leases a lot in a subdivision —

(1) in violation of section 1404, or

(2) by means of a property report which contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein, may be sued by the purchaser of such lot.

(c) The suit authorized under subsection (a) or (b) may be to recover such damages as shall represent the difference between the amount paid for the lot and the reasonable cost of any improvements thereto, and the lesser of (1) the value thereof as of the time such suit was brought, or (2) the price at which such lot shall have been disposed of in a bona fide market transaction before suit, or (3) the price at which such lot shall have been disposed of after suit in a bona fide market transaction but before judgment.

III

The Lawsuit

On August 6, 1971, Pacquin and wife filed suit against Four Seasons of Tennessee and Norman H. Cronk for $8,010.30, the purchase price of the land and the cost of recording the warranty deed, plus interest and costs.

The gist of the Complaint appears in its paragraphs numbered 10, 11, and 13, which alleged that the plain-

tiffs were given a property report to read, that in reliance upon its representations, the oral representations of Cronk, "as well as a proposed timetable for the development of all its facilities, plaintiffs did succumb to the lures so enticingly urged upon them and bought from defendant Four Seasons of Tenn., through its agent Norman H. Cronk, one of the lots offered for sale".

The concluding paragraph, Number 13, read as follows:

> "Unbeknownst to plaintiffs, but known to defendant Four Seasons of Tenn. and to the developer whose name was stated in the Property Report, namely Diversified Land Developers, Inc., the latter was the wholly-owned subsidiary of Whale, Inc., a corporation, and Whale, Inc., was, on July 12, 1970, in the throes of bankruptcy. Diversified Land Developers, Inc.,'s, timetable for the development of Four Seasons of Georgia was heavily dependent upon financing to be provided by its then parent corporation, Whale, Inc., but by July 12, 1970 Diversified Land Developers, Inc., and defendant Four Seasons of Tenn., knew or should have known that (a) Whale, Inc., could not provide the needed financing and (b) the timetable for the completion of their projects shown or explained to plaintiffs and relied upon by plaintiffs was totally unrealistic, not founded in reason, misleading, and contrary to the requirements of the Interstate Land Sales Full Disclosure Act and the rules and regulations thereunder."

After a two day Bench trial, Judge Henderson found that the sale was not exempted by 15 U.S.C. § 1702(a)(10) and we agree. He found that *for the purposes of offering the lot for sale*, Cronk was an agent of the developer within the meaning of § 1701 of the Act, which was conceded in oral argument before this Court. He further held that there was no evidence that Cronk had knowingly and wilfully misrepresented material facts in the sale of the lot. After a critical examination of the trial record, with this we also agree.

The trial court then concluded as follows:

> "Liability under 15 U.S.C. § 1703(a)(1) is dependent on a statement of record in effect pursuant to 'section 1706 of this title' and a 'property report meeting the requirements of section 1707 of this title, being furnished to the purchaser in advance . . .' of the sale. The statement of record filed with the Secretary of the Department of Urban Development (Defendant's Exhibit No. 3), complies with 15 U.S.C. § 1706 (24 C.F.R. § 1710.105). Similarly, the property report (Plaintiffs' Exhibit No. 7) fulfills the requirements of 15 U.S.C. § 1707 (24 C.F.R. § 1710.110). No evidence was adduced at the trial to establish the contrary. Neither is there any showing of a material misrepresentation or omission of material facts in the property report. Accordingly, the plaintiffs have not sustained the burden of proof in establishing their right of recovery."

We think this is factually supported by substantial evidence in the record and is legally correct.

We have carefully considered each and all of the attacks on the statement of record and on the property report. We are compelled to say that they fail either for lack of factual substance or for lack of materiality.

We need only discuss the allegation that once Whale, Inc., filed in bankruptcy Four Seasons of Tennessee had the duty, under the Act, to divulge that fact in its property report. We have already pointed out that Four Seasons of Tennessee was a corporation in its own right, a separate entity, a legal being with an existence separate and distinct from that of its stockholders, *Krivo Industrial Supply Company v. National Distillers and Chemical Corporation*, 5 Cir., 1973, 483 F.2d 1098, 490 F.2d 916. As already pointed out, there is no evidence whatever that Four Seasons of Tennessee held itself out as relying on Whale's financial assistance or that Whale had anything to do with the development other than it owned the stock of the corporation which owned the stock of Four Seasons of Tennessee.

On the other hand, the property report repeatedly warned that success depended on satisfactory sale of the lots and the ability of Four Seasons of Tennessee to secure adequate financing.

We are therefore of the opinion that the District Court could justifiably hold, as it did, that the failure to mention Whale, and its status, was immaterial.

As a matter of fact, some weeks after the Paquin transaction the President of Diversified bought all of Diversified's stock from Whale's trustee and paid cash for it.

IV

An Additional Point

The record reflects that the litigants did not direct the critical attention of the trial Court toward § 1410 of the Act. If they had done so the Court might have quickly decided the case on that point alone. Under the facts of this case § 1410, quoted *supra*, does not authorize the suit against Cronk. A careful reading of that section shows that under § 1410(a) *the developer* may be sued for its wrongful acts AND for those of its agent. But § 1410(b) plainly states that an agent may be sued only if he "*sells* (emphasis added) or leases a lot in a subdivision". Under the record before us, Cronk had no authority to sell. He did not hold himself out to the Paquins as having that authority. To the contrary, in their presence, Cronk had to confer with Tennessee's sales manager on the premises to obtain the price at which Tennessee would sell. Cronk could show the property and conduct the prospective purchasers around the premises but when the Paquins made the decision to buy they were turned over to another employee who made out the contract, reciting that Tennessee was the seller. Cronk had no part in this transaction, although, unbeknownst to him, his name was typewritten on the document as "the authorized representative", whatever that meant. Tennessee, of course, executed the deed of conveyance and had it delivered.

We think the language of § 1410 clearly indicates that Congress intended the developer to be liable for its own acts and those of its agents, which is the usual rule, but it did not mean to scoop up every guide or

salesman, such as this retired army officer, and make them pay unless they, too, have the authority to sell and do sell.

There was a default judgment here against the developer, which the record indicates is worthless, but, even so, the Court found that Cronk made no misrepresentations. He had no authority to sell the lot, he did not sell it, and Congress did not so write the statute as to make Cronk liable for the misdeeds of others, had there been any within the terms of the Act.

V

Appellants complain that the trial court allowed interest on the default judgment only from its date. This action, however, was correct. The extent of recovery is clearly spelled out in § 1410.

The judgment of the District Court is

Affirmed.

CLARK, Circuit Judge (dissenting).

In my view the failure of the Property Report to state that the senior parent in the developer's corporate ancestry was bankrupt was a clear violation of the Interstate Land Sales Full Disclosure Act. That Act requires that disclosure be made of all material facts. According to the test recognized by the majority, a fact is material if a reasonable investor may have considered it important in making a decision. The significance of the present omission to one in Paquin's

position can best be demonstrated by reviewing the Property Report with the pass over supplied in italics. The paragraph in question would then read:

> No assurances of completion can be given for any of the above services to be expressly provided by the developer at Four Seasons of Georgia other than the good faith and past reputation of the developer. Completion of these, as in other areas of development, will be dependent upon the satisfactory sale of lots at Four Seasons of Georgia and the developer's ability to secure adequate financing. *The corporation which owns all of the stock of the corporation which owns all of the stock of the developer is now in bankruptcy.*

This omission should have appeared a total of seven times throughout the Report. The vital import of the left out fact to potential purchasers is self-evident.

The "Additional Point" which appears in the majority opinion finds that Cronk did not "sell" the lot to Paquin within the meaning of § 1410(b). The district court, on the other hand, found that Cronk was an agent under § 1402(5) and that he made offers to sell and was present at the sale. However, because it found the property report sufficient and no misrepresentations by Cronk, that court never reached the need to find whether Cronk's intimate involvement in Paquin's purchase transaction made him one who "sells" within the meaning of § 1410(b). If Cronk was a seller the deficient Property Report renders him liable under the act. I would remand the "seller" issue to the

district court rather than making that fact determination in this appellate forum.

I respectfully dissent.

APPENDIX C

Claude Y. PAQUIN et al.,
Plaintiffs-Appellants,

v.

FOUR SEASONS OF TENNESSEE, INC., et al., Defendants,

Norman H. Cronk, Defendant-Appellee.

No. 74-2890.

United States Court of Appeals,
Fifth Circuit.

Nov. 7, 1975.

Appeal from the United States District Court for the Northern District of Georgia; Albert J. Henderson, Jr., Judge.

ON PETITION FOR REHEARING
AND PETITION FOR REHEARING EN BANC

(Opinion Sept. 17, 1975, 5 Cir., 1975, 519 F.2d 1105).

Before COLEMAN, MORGAN and CLARK, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is denied and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is denied.

CLARK, Circuit Judge (dissenting):

I respectfully dissent from the panel's refusal to grant rehearing. The petition for rehearing corrects a factual mistake in my prior dissent which makes the case even stronger.

Three corporations were involved in this litigation: Whale, Inc., which owned Diversified Land Developers, Inc., which owned Four Seasons of Tennessee, Inc. At the time I prepared my dissent to the panel opinion, I was of the opinion that Four Seasons was the developer of the lands involved. The decisional portion of the majority opinion, 519 F.2d at 1110, also treated Four Seasons as the developer. Diversified Land Developers, Inc., is and at all times was the developer within the meaning of the Interstate

Land Sales Full Disclosure Act. Neither the existence of a corporation named Four Seasons nor its corporate vitality is material to any issue in this case. Diversified was the developer; Whale, its parent, was bankrupt. That fact was obviously even more material than a two-corporation-removed failure. *A fortiori*, it should have been disclosed. In addition, Whale's bankruptcy petition appeared to take Diversified Land Developers, Inc., into bankruptcy also. Section IV of their bankruptcy petition stated: Whale "has no available cash with which to pay its past due obligations or those of its subsidiaries . . ." The petition specifically lists Diversified as Whale's subsidiary and its prayer asked that "persons be enjoined and stayed from commencing or continuing any action at law or suit or proceeding in equity against [Whale] *or its subsidiaries* . . . ."

24 CFR § 1710.105 Part II(c)(2) (effective December 1, 1973) now requires that a developer reveal in his Property Report whether any principals have voluntarily filed petitions in bankruptcy or have had involuntary petitions in bankruptcy filed against them. A principal is defined as someone who has a 10 percent or more financial interest in the developer. This subsequent administrative interpretation reinforces my conclusion that the Property Report failed to include a most material fact.

Supreme Court, U. S.
FILED
APR 16 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1135

CLAUDE Y. PAQUIN, et ux.,
Petitioners,

versus

FOUR SEASONS OF TENN., INC., et al;
NORMAN H. CRONK,
Respondent.

BRIEF FOR RESPONDENT NORMAN H. CRONK IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE
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OPINIONS BELOW

The opinions below are set out in full in the appendices to Petitioners' Brief, and the opinion of the U.S. Court of Appeals for the Fifth Circuit is reported at 519 F.2d 1105 and that court's opinion on motion for rehearing at 522 F.2d 1270.

JURISDICTION

The Petition for Certiorari (pp. 2 and 3) adequately sets forth the jurisdictional requisites.

QUESTIONS PRESENTED

Petitioners' statement of "Questions Presented for Review" are not at all in accord with the record in this case. The record would support the following "questions":

(1) In a suit against a land *owner* and an *employee* of the *developer* involving a land purchase transaction occurring some years prior to the December 1973 amendments to 24 C.F.R. §1710.105 [Part II(c)(2)] would the failure of the *developer* corporation to amend its theretofore printed *Property Report* to reflect the fact of the filing six weeks prior to the transaction of a Reorganization Proceeding by the developer corporation's separate corporate parent, but the Property Report stating, many times: "Completion is dependent upon the satisfactory sale of lots . . . and the developer's ability to secure adequate financing", and there being no prejudice resulting from such Reorganization Proceeding (because the developer corporation was promptly purchased by outside interests), constitute a *per se* and *irrebutable* violation of the Interstate Land Sales Full Disclosure Act of 1968 thereby causing *absolute liability* to fall upon one of the developer's "sales" force having no knowledge of the Reorganization Proceeding but involved to some degree in the sale transaction?

(2) May the damages recoverable under the Interstate Land Sales Full Disclosure Act include prejudgment interest on the damages suffered by plaintiffs as revealed by the evidence?

(3) Whether the Findings of Fact, Conclusions of Law and Judgment of the District Court were clearly erroneous in finding: That the "Statement of Record" and "Property Report" met the requirements of law and that appellants' evidence failed to show any misrepresentation or omission of material fact therein, and, thus, appellants failed to meet their burden of proof? [The trial court in its order of August 16, 1974 correctly observed that: "The issues raised in this appeal primarily present questions as to the sufficiency of the evidence."]

STATUTE INVOLVED

Petitioners have correctly stated that the case involves "The Interstate Land Sales Full Disclosure Act", P.L. 90-448 (15 U.S.C.A. §§1701-1720), but they have omitted material portions thereof from their petition. Reference should be had to the entire Act as it was in July, 1970 (prior to the October and December, 1970 and the August, 1974 amendments, but after the December, 1969 amendment).

STATEMENT OF THE CASE

Petitioners here, plaintiffs below, on July 12, 1970, contracted to purchase from Four Seasons of Tennessee, Inc. a single lot in a real estate development located in Coweta County, Georgia known as "Four Seasons of Georgia". Before the contract of purchase was signed by Petitioners, they (both husband and wife) had carefully inspected the development in person on a personal "guided tour", driven (in his personal automobile) by Respondent Norman H. Cronk, a part time (Sunday afternoons) employee of

the developer (Diversified Land Developers, Inc.). At that time Petitioner Claude Paquin was a graduate actuary of some distinction, and a law student. Respondent Cronk was a retired Lt. Col. from the U.S. Army.

Respondent Cronk steadfastly maintained that he was nothing more than a guide (termed a "lineman") around the property. Petitioners, on the other hand, maintained that he played some part in the pricing of the lot (by telling the petitioners that they could obtain the lot for less than the printed list price — thus acting in favor of the petitioners) and by *handing* to Petitioners some of the papers concerning the actual sale thereby became a "salesman" agent of the developer. It is undisputed that Respondent Cronk signed no papers, contracts, deeds or the like. All contractual obligations were directly between Four Seasons of Tennessee, Inc., their sales personnel (as distinguished from "linemen" such as Cronk) and Petitioners — Respondent Cronk was in no way involved.

It was not until six (6) weeks after the signing of the contract [*and after* the developer, "Diversified Land Developers, Inc." became totally disassociated from the then reorganizing "Whale, Inc."] that the Petitioners paid the balance of the purchase price. Even then they did not pay to the attorney handling the matter the deed recording costs and thus there was a delay (until after Petitioners did pay those charges) in recording their Warranty Deed. Petitioners' recording fee check did not clear the bank until *November*, 1970. Prior to the time Petitioners paid the vast majority of the purchase price they had been put on actual

notice, by letter, of the Chapter X proceedings as to "Whale, Inc.", and the later disassociation of the Developer from "Whale, Inc." — yet they still paid. Waiver?

The Petitioners' statement of facts becomes involved with the Chapter X (and eventual bankruptcy) proceedings against a corporation known as "Whale, Inc.". *That corporation was neither the owner nor the developer of the subject property* known as Four Seasons of Georgia. Though Whale, Inc. did go through Chapter X and (much after the facts here) bankruptcy proceedings, and regardless of the prayers of its bankruptcy petition, *neither* the property owner *nor* the developer here involved did. Thus the bankruptcy of Whale, Inc. has no legal bearing on these proceedings whatsoever. There certainly was no legal requirement (either by statute or regulation in force at that time) that Whale, Inc. (or any parent or subsidiary corporation be brought into the Property Report.

Petitioners' "Statement of the Case" is *utterly without foundation in the evidence* in stating (p. 9) "[t]he developer went bankrupt . . ." Nor are Petitioners correct in stating that the trial court "refused to acknowledge the evidence of bankruptcy" [of "Whale, Inc."] as the only evidence tendered on the subject was *admitted* into evidence by the trial court.

The Petitioners mislead when theyindicate that the developer was a defendant — *it is not*. Only Respondent Cronk and the realty owner "Four Seasons of Tennessee, Inc." were ever named defendants — and

the majority of the Court of Appeals was *correct* in stating that that defendant *was* two corporations removed from "Whale, Inc.".

The many caveats contained in the Property Report (admittedly *thoroughly* read by Petitioner Paquin) pointed out to the public that:

> "*No assurances of completion can be given . . . Completion* in these, as in other areas of the development, *will be dependent upon* the *satisfactory sale of lots* at Four Seasons of Georgia *and the developers ability to secure adequate financing.*" (emphasis added)

It is correct that the developer was one step removed from "Whale, Inc.", but it was not named as a defendant in this action.

[In addition to the absolute lack of evidence as to any false or misleading statement in the Property Report, it now appears that the lot of which Petitioners complain is *not* the lot as to which Respondent Cronk had his dealings with Petitioners. It appears that Petitioners, in some way and at sometime unknown to Respondent Cronk elected to purchase a lot *other than* the lot shown to them by this Respondent, but the record is completely silent on the matter and, therefore, cannot be discussed further.]

Respondent does not agree with Petitioners "Questions Presented for Review", because *the real question here posed is whether the findings of fact by the trial court were clearly erroneous.* The Court of

Appeals held not. This is not a question for the Supreme Court of the United States — it was a question of evidence.

SUMMARY OF ARGUMENT

Petitioners' statement of "Questions Presented" raises "straw-man" issues which are not at all in the case.

This is a case which turned solely on the evidence. There is no conflict of decisions of Circuit Courts involved. The Regulations under which this case was decided have since been changed and a decision under the old regulations controlling in this case would have no beneficial "guide-line" effect for the lower courts. In short, the petition presents nothing warranting this Court's consideration.

ARGUMENT

I. Alleged "Departure from Usual Course of Judicial Proceedings"

What is urged by Petitioners to be a mis-statement (at one point — it is clearly correctly stated elsewhere) in the decision of the Court of Appeals as to who the developer was (it wasn't a party anyway!) forms the basis of this portion of the petition. The Developer was a corporation named "Diversified Land Developers, Inc." — its only part in this action was the fact that the statute makes it (a *non-party* here) primarily responsible for complying with the requirements of the Act. It was also the employer of Respondent Cronk. It was

the corporate "son" of "Whale, Inc." and it was the corporate parent of the *owner* of the land, "Four Seasons of Tenn., Inc." the only other defendant (other than Respondent Cronk) named and served in this case. It was this other defendant — "Four Seasons of Tenn., Inc." — which was the corporation two steps removed from the Reorganizing "Whale, Inc.". The Court of Appeals, in this myriad of "Four Seasons" and other corporations, in division III of its opinion, put the burden of the Property Report preparation on the owner — "Four Seasons of Tenn., Inc." rather than on the developer — which really aided petitioners' case rather than harming it, since petitioners failed to name the Developer as a defendant.

Petitioners are plainly in error in indicating to this Court that the trial court rejected the tendered evidence of the "bankruptcy" of "Whale, Inc." :actually a Chapter X proceeding at all times material hereto). The evidence *was* received by the trial court *over this Respondent's objection*. The trial court simply did not find the "bankruptcy" to be controlling in view of the two corporation gap between a named corporate defendant and "Whale, Inc." — especially in view of the fact that both the Developer and the Owner were "divorced" from "Whale, Inc." by purchase by outside owners very early in the Chapter X proceedings.

In this same section of their brief, petitioners raise a hitherto *non-issue* — the applicable statute of limitations. This is purely a "straw-man". There was no plea of the statute — no question but that it had *not* run — nothing until this very moment when

petitioners set it up in some vain attempt to obtain this Court's Writ of Certiorari.

II. No Conflict of Decisions

Petitioners state that the decision in the case *sub judice* conflicts with the decision of this Court in *Affiliated Ute Citizens of Utah vs. United States*, 406 U.S. 128, 153-54 (1972). The truth is that the cases are entirely different, but if anything that case supports the decision of the lower courts here. *Ute Citizens* was a fraud case under S.E.C. Rule 10b-5 in which it was held that a bank-market maker-transfer agent-virtual trustee has a duty to disclose to its principals (the stock owning Utes) the fact known to it that the stock could be sold for prices higher than that at which the bank actually sold on behalf of its stockholders-principals. It is a *fraud* case.

The case *sub judice* is *not* a fraud case. It is not a 10b-5 case. It is an Interstate Land Sales Act case in which the petitioners received a verdict against the owner, but did *not* receive a verdict against the "lineman" (a guide around the property) — Lt. Col. Cronk. There was *no* evidence of any mis-statement of material fact — much less fraud. Petitioners complaint rests solely on an alleged failure to disclose a then recent change as to the financial status of a *related*, but uninvolved, corporation — which, before the transaction was completed, was no longer even related.

III. The Supposed Undecided Question of Federal Law

The trial court held that Respondent Cronk *was* subject to the Act (which is exactly what petitioners say should be decided by this Court). Thus petitioners' "important question" has already been decided in their favor. This Court can go no further. The Court of Appeals *said* that the trial court's ruling was *more favorable* to petitioners than that court would be, in view of Cronk's relatively minor role in the purchase by petitioners — but petitioners have not been harmed by that statement of the Court of Appeals since the judgment rests on the proposition that Cronk *was* subject to the Act.

In the recent case of *Foremost-McKesson, Inc. vs. Provident Securities Company*, 423 U.S. ____, 46 L.Ed. 2d 464, 96 S. Ct. 508 (January 13, 1976) this Court held that the analogous S.E.C. Act of 1934 does not impose *absolute* liability on everyone who has anything to do with every transaction, saying: "It is inappropriate to reach the harsh result of imposing . . . liability without fault on the basis of unclear language. If Congress wishes to impose such liability, we must assume it will do so expressly or by unmistakable inference." (46 L.Ed. 2d at 478). Petitioners seek to impose absolute liability on every person made subject to the Act. Here, on consideration of the evidence, the trial court properly held that to impose liability on Respondent Cronk who was completely innocent of any wrongdoing would be too harsh a result.

This Court, we believe, would agree. The result was correct and is not in need of review by this Court.

WHEREFORE, Respondent Cronk prays that the petition be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the above and foregoing Brief have this date been served upon opposing counsel of record by placing the same in the United States mail, postage prepaid and properly addressed to:

Mr. Claude Y. Paquin
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This ____ day of April, 1976.

_____
FLOYD E. SIEFFERMAN, JR.